

UNITED STATES PATENT AND TRADEMARK OFFICE

BEFORE THE PATENT TRIAL AND APPEAL BOARD

Canon Inc., Canon U.S.A., Inc., and Axis Communications AB,

Petitioner

v.

Avigilon Fortress Corporation,

Patent Owner

Case: IPR2019-00311

U.S. Patent No. 7,932,923

Issue Date: April 26, 2011

Title: Video Surveillance System Employing Video Primitives

**PETITIONERS' REPLY TO
PATENT OWNER'S PRELIMINARY RESPONSE**

Pursuant to the Board’s April 17, 2019 Order (Paper 10), Petitioners hereby reply to the arguments made in Patent Owner Avigilon’s April 9, 2019 Preliminary Response (Paper 9) regarding the publication status of *Kellogg* and *Brill*.

I. Avigilon Misapplies the Board’s *Inter Partes* Review Evidentiary Rules

A. Pre-Institution, the Board Must View the Evidence in the Light Most Favorable to the Petitioner

The rules governing institution decisions expressly state that even if a patent owner submits testimonial evidence to contradict a petition “a genuine issue of material fact created by such testimonial evidence will be viewed in the light most favorable to the petitioner” in deciding whether to institute. 37 C.F.R. § 42.108(c). This distinguishes Avigilon’s primary authority, *Acceleration Bay, LLC v. Activision Blizzard Inc.*, in at least two ways. First, in *Acceleration Bay*, the Federal Circuit found that the Board did not abuse its discretion in its balance of all the evidence in rendering a Final Written Decision. 908 F.3d 765, 767 (Fed. Cir. 2018). Second, the patent owner in *Acceleration Bay* submitted evidence during the trial expressly rebutting the evidence of publication and showing that it was *not* reliable. *Id.* at 773. *Acceleration Bay* does not support Avigilon’s arguments, which are being made pre-institution, and Avigilon provides *no* contrary evidence.

B. Avigilon’s Arguments Are Improper Pre-Institution Evidence Objections

Avigilon’s arguments concerning the admissibility of Petitioners’ evidence under the Federal Rules of Evidence, *see e.g.*, POPR at 20 (citing FRE 602), are an improper attempt to couch evidentiary objections as sufficiency arguments to perform an end run around the Board’s clearly laid out procedures for objecting to and attempting to exclude evidence. The Board’s rules require that “[a]ny objection to evidence submitted during a preliminary proceeding must be filed within ten business days of the institution of the trial.” 37 C.F.R. § 42.64(b). The party relying on the objected-to evidence then may “respond to the objection by serving supplemental evidence.” *Id.* Later, the party objecting to the evidence may move to exclude it. 37 C.F.R. § 42.64(c).

As other panels have found, pre-institution motions to exclude printed publications that allegedly “have not been authenticated” and are “inadmissible as hearsay” should be rejected and do not support a patent owner’s request to deny *inter partes* review. *LKQ Corp. v. Clearlamp LLC*, IPR2013-00020, Paper 17 at 3-4 (March 5, 2013). Avigilon’s POPR improperly “urges the Board to consider the evidentiary issues as part of [its] determination to institute a trial” and, therefore, must be denied because it seeks to deny Petitioners of their opportunity to address Avigilon’s evidentiary objections, if necessary. *Id.*

II. Avigilon's Assertion That "Personal Knowledge" Is Required Is Wrong

Avigilon's cited authority does not support its assertion that someone with personal knowledge of the particular library's practices is needed to show public availability. POPR at 20, 27. Both *Hall* and *Acceleration Bay* merely affirmed findings of publication where evidence of persons with personal knowledge was submitted—they did not dictate such evidence is required in all cases. *In re Hall*, 781 F.2d 897, 897 (Fed. Cir. 1986); *Acceleration Bay*, 908 F.3d at 773. Indeed, neither *Hall* nor *Acceleration Bay* turned on the relationship between the declarant's knowledge of the publishing library, and neither precludes competent evidence of a reference's public availability being shown by a declaration of a professional librarian with knowledge of a library's practices or a standardized cataloging system (such as the MARC system) widely used by libraries to record and make references accessible to the public. Ms. Florio's testimony is in line with evidence routinely used by lawyers representing petitioners. Indeed, Patent Owner's counsel has recently supported a petition with a law firm librarian declaration testifying without personal knowledge to the authenticity and publication dates of prior art references obtained from other libraries. *See Cisco Sys., Inc. v. Chrimar Sys., Inc.*, IPR2019-00401, Ex. 1024 at ¶¶ 10, 16, 22, 29. Avigilon also did not dispute Ms. Florio's testimony that *Kellogg* and *Brill* were publications in IPR2018-00138; *see especially* Ex. 1007 (Florio Declaration).

III. Board Precedent Supports Ms. Florio's Declaration

Prior Board decisions have repeatedly found declarations from professional librarians sufficient to establish the public availability of a reference. In *Symantec*, the patent owner—like Avigilon here—argued that a reference was not shown to be publicly available because the librarian declarant “had no first-hand knowledge as to the public availability” of the reference “or the creation of the MARC record” for it. *Symantec Corp. & Blue Coat Sys. LLC v. Finjan, Inc.*, IPR2015-01892, Paper 58 at 29 (March 15, 2017). The Board rejected these arguments, “credit[ing] Dr. Hall-Ellis’s testimony regarding *the reliability of MARC records.*” *Id.* at 31 (emphasis added). While the *Symantec* Petitioner submitted post-institution evidence from a declarant with personal knowledge, the Board held, “even disregarding Petitioner’s Reply evidence,” Petitioner’s pre-institution declaration was sufficient to establish publication based on a MARC record without the declarant’s personal knowledge of the MARC record’s generation. *Id.*

The cases Avigilon cites do not suggest otherwise and do not address the testimony of professional librarians based on library practices or MARC records. *Ford Motor Co. v. Versata Dev. Grp., Inc.*, IPR2016-01019, Paper 9 at 6 (Oct. 4, 2016) (technical expert relying on a current (non-prior art) website); *Blue Calypso, LLC v. Groupon, Inc.*, 815 F.3d 1331, 134 (Fed. Cir. 2016) (upholding final

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